J.C. Penney Company, Inc. and United Paper and Allied Workers Local 1049, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 25-RC-7521

March 16, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE ¹

By Members Fanning, Jenkins, and Zimmerman

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held on October 24, 1980,² and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of Petitioner's exceptions and the Employer's answering brief and hereby adopts the Hearing Officer's findings only to the extent consistent with its decision herein.

The only issue before us is whether the election should be set aside on the ground that Supervisor John Ferro's active support of the Union during the course of the Union's organizing campaign tended to coerce employees into supporting the Union out of fear of supervisory retaliation.

The Hearing Officer found that there was a reasonable possibility that Ferro's actions could have coerced employees to vote for the Union out of fear of retaliation by Ferro. He therefore recommended setting aside the election. Petitioner contends, *inter alia*, that Ferro did not consistently support the Union throughout the campaign and that the Employer posted letters to employees which removed any reasonable possibility of their fearing retribution.³ We find merit in these contentions.

The Hearing Officer found, and we agree, that Ferro's role in Petitioner's organizational campaign was limited to discussions with employees. Prior to the filing of the petition, Ferro told employees Hart and Shedrow that they needed union representation because management was planning to make some job changes which would adversely

¹ The instant decision supplements the Order issued by the Board in this proceeding on April 8, 1981 (not reported in volumes of Board Decisions)

affect them. After the Employer received the Union's letter requesting recognition, Ferro continued to show an interest in the Union's organizational campaign by explaining to employee Hart the nature of the job changes that were decided upon by Store Manager McCal and Personner Manager Fulton. 4 Two months before the election, Ferro told employee Bracker that it was good that the Union had requested recognition. During the week before the election, Ferro told Bracker that the Union was not going to do "Jack's shift" [sic] but winked as he made the statement which suggested to Bracker that Ferro did not mean what he said. Sometime between July and the date of the election Ferro advised employee Shedrow that "we can't get [the Union] in here" and that he and Hart had a plan which might obviate the need for

The Employer was not aware of Ferro's activities until after the election. However, the Employer posted two letters to employees on or about September 16 and October 10, which discussed the job security of unit employees. The first letter, signed by McCal, set forth existing company policy and store practice regarding job security. McCal stated, *inter alia*, that although business was not good, the staffing at the Employer's auto center was completely within company guidelines and that it was agreed that there would be no cutbacks in staff.

The second letter, signed by the Employer's counsel, dealt with the specific issue of disciplining or discharging employees in retaliation for union activity. The letter stated that such action violated Federal law and employees so affected could pursue their rights through the National Labor Relations Board, at the Government's expense. The local Board office address and phone number were given. Further, the letter stated that retaliation against employees would violate company policy and could subject the management person responsible to discipline or discharge. The name, address, and telephone number of a company official was given as the person to receive any complaint.

² The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally of ballots was five votes for, and three against. Petitioner, there were no challenged ballots. All dates herein are 1980 except as otherwise stated.

³ Petitioner also contends that Ferro was a minor supervisor. We find it unnecessary to pass on this contention in view of our finding, inter alia, that Ferro's activity in any case did not warrant setting aside the election.

⁴ The Hearing Officer found that Ferro told Hart on about six occasions before the election that the changes included laying off one employee and offering him a lower paying job, discharging a second, and transferring a third employee from parts manager to stock boy. The Hearing Officer found that these comments did not constitute threats of reprisal resulting from the employees' union activities, because the alleged planned changes formed the basis for Ferro's suggesting to employees that they seek union representation. He also found that Ferro's prounion statements did not warrant setting the election aside because they were not inconsistent with the Employer's expressed views about unionism and such statements contained no threats of reprisals or promise of benefit. No exceptions have been taken to these findings which are adopted protorma.

It is well settled that a supervisor's participation in a union organizing campaign can be grounds for setting aside an election when there is a reasonable basis for concluding that such conduct could coerce employees into supporting the union out of fear of supervisory retaliation. In Flint Motor Inn Company d/b/a Sheraton Motor Inn, 194 NLRB 733 (1971), the Board set aside an election where a major supervisor who had the power to affect the employment status of unit employees displayed active and outspoken support for the Union throughout the organizational campaign including the day of the election. The supervisor's prounion activities included soliciting authorization cards, meeting with union officials during the campaign and on the day of the election, and functioning as the union's contact with unit employees.

At the outset, we observe that the supervisory activity here does not rise to the level of that in *Sheraton Motor Inn*. Supervisor Ferro did not solicit union authorization cards, act as a union contact, or meet with union officials at any time. Further, Ferro, as the Hearing Officer found, made both prounion and antiunion remarks during the campaign. For example, sometime between July and the date of the election Ferro told a unit employee that a union might not be necessary because he had a plan. In the week prior to the election he told another employee that the Union would not do anything.

Contrary to the Hearing Officer, we find that Ferro's mild and inconsistent support for the Union does not give rise to the reasonable possibility that his support coerced employees to vote for the Union out of fear of retaliation. This finding is further supported by the Employer's posting of letters assuring employees repeatedly that they would not be subject to reprisals regardless of how they voted

in the election, and that they were free to complain about any unfair treatment to management, and to file charges with the National Labor Relations Board. We thus conclude, contrary to the Hearing Officer,⁵ that in light of these postings Ferro's mild and inconsistent support of the Union did not tend to coerce employees to vote for the Union out of fear of retaliation by him.

In view of the foregoing, we shall overrule Objection 2 and issue the following:

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for United Paper and Allied Workers Local 1049, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All auto-center employees employed by the Employer at its 3701 South Main Street, Elkhart, Indiana establishment, including all automotive selling specialists; BUT EXCLUDING all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and all other employees.

⁵ As McCal signed the September 16 letter, his name was typed for signature on the October 10 letter, and that letter was also typed for signature and signed by Vernon, a company official, we find misplaced the Hearing Officer's minimizing of the second letter by referring to it as signed only by the Employer's counsel and not by McCal. Indeed, Vernon, as regional counsel, obviously exercised greater authority than McCal, a local store manager, with respect to the matter discussed in that better.